MODIFIED: November 2, 2010

In the Missouri Court of Appeals
WESTERN DISTRICT

STATE EX REL. PRAXAIR, INC., AG PROCESSING, INC., A COOPERATIVE, AND SEDALIA INDUSTRIAL ENERGY USERS' ASSOCIATION,	)	
APPELLANTS;	)	
OFFICE OF PUBLIC COUNSEL,	)	
APPELLANT,	)	
	)	
v.	)	**WD71340**
	)	**CONSOLIDATED WITH WD71396**
MISSOURI PUBLIC SERVICE COMMISSION, GREAT PLAINS ENERGY, KCP&L, KCP&L GREATER MISSOURI OPERATIONS CO.,	)	**OPINION FILED: AUGUST 17, 2010**
RESPONDENTS.	)	

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY
THE HONORABLE JON EDWARD BEETEM, JUDGE

Before Lisa White Hardwick, P.J., James M. Smart, Jr., and Alok Ahuja, JJ.

The Appellants include the Office of Public Counsel (a state agency established pursuant to section 386.700[1] that represents utility ratepayers) and a consortium of intervening industrial utility consumers composed of Praxair, Inc., AG Processing, Inc., A Cooperative, and Sedalia

[1] Statutory references are to the Revised Statues of Missouri (RSMo) 2000, unless otherwise noted.

Industrial Energy Users' Association ("the Industrial Intervenors"), who intervened in the Public Service Commission proceeding. The Appellants contend that the Public Service Commission exceeded its authority in approving the acquisition by Great Plains Energy, Inc. of Aquila, Inc., a Missouri utility company. Great Plains is the holding company of Kansas City Power and Light, operating under the brand name KCPL**.** Because of the approval of the acquisition of Aquila, Great Plains now also holds Aquila, which it has renamed "KCPL Greater Missouri Operations." The Appellants bring three points, all of which relate to procedural rulings. The ruling of the Commission is affirmed.

Background

On April 4, 2007, Great Plains, KCPL, and Aquila ("the Utilities") applied to the Public Service Commission for approval of Great Plains' plan to acquire Aquila's stock and operate it as a wholly-owned subsidiary. Under the proposed plan, both Aquila and KCPL would operate as subsidiaries of Great Plains.

Shortly thereafter, the Commission issued notice to the public of the proposed transactions. The Commission granted the timely intervention requests of the Industrial Intervenors and various other entities, including several federal agencies.

Hearings before the Commission began on December 3, 2007. Three days later, one of the five sitting commissioners filed a notice of his intention not to participate. That same day, the Commission granted the Utilities' request for a temporary recess.

During the recess period, and based on evidence presented at the hearings, the Office of Public Counsel filed a motion to dismiss. It claimed that pre-filing meetings between three of the remaining commissioners and two Great Plains executives created the appearance of impropriety. Public Counsel said the three commissioners must recuse themselves, and the case

must be dismissed because only one commissioner would remain. The Commission denied the motion.

While the matter was pending, the Commission received four anonymous letters objecting to the merger. The letters purported to be from employees, shareholders, and ratepayers of the Utilities. The letters alleged various issues, including issues relating to the receipt by employees of gifts and gratuities from companies that contract with the Utilities to provide supplies or services. In keeping with its customary practices, the Commission's Staff initiated an investigation based on those letters. The concern of those objecting to the gift and gratuities policies of Great Plains and KCPL was that the policies of Aquila (which were ethically superior) would be degraded to that of Great Plains and KCPL, causing incentives that would undermine the principle of doing business at the lowest reasonable cost to the ratepayers. The Staff received many pages of documents and deposed officers and employees of the Utilities. The Staff included the matters investigated in its "list of issues" to be addressed at the hearing. The Commission later stated in its Report and Order that it did not adopt the Staff's list of issues, because (1) "it was not agreed to by the parties" and (2) the "Staff's framing of the issues may not accurately reflect the material issues to this matter."

In mid-April, the Utilities filed a motion to limit the scope of the proceedings. They sought to preclude evidence of their corporate codes of conduct and gift and gratuities policies. They argued that this evidence was irrelevant to whether the merger would be "detrimental to the public" (the standard for deciding if the merger should be approved). The motion also sought to limit evidence pertaining to KCPL's Iatan construction projects, except as it related to the proposed merger, and to preclude evidence about Aquila's future regulatory plans and "additional

amortizations" issues. The Staff opposed the motion, as did Public Counsel and the Industrial Intervenors.

When the hearings resumed in April, a newly appointed commissioner notified the parties of his prior affiliation with the law firm representing Great Plains. The Appellants objected to his participation, and the commissioner recused himself. Only three commissioners remained on the case.

On April 24, the Commission heard arguments on the Utilities' motion to limit the scope of the proceedings. The presiding officer ultimately granted the motion, ruling that evidence relating to corporate codes of conduct, gift and gratuities policies, and the anonymous letters was "wholly irrelevant" to the issue at hand. The presiding officer found that evidence regarding Aquila's additional amortizations was "probably irrelevant," but not "wholly irrelevant." The scope of evidence about the Iatan projects would be limited to the extent that the Utilities had requested.

At the hearings, which continued throughout April, the Commission's Staff was represented by the Commission's General Counsel. The Commission's Staff opposed the proposed acquisition. The Staff believed that the price to be paid by Great Plains was excessive, and that because the price was too great, the consumer ratepayers would end up paying (through increased rates) the difference between the actual value of Aquila and the transaction price.

In total, the Commission admitted the testimony of thirty-four witnesses and received 140 exhibits. The Commission permitted an offer of proof on the amortizations issue, but refused an offer as to the Utilities' gift and gratuities polices. The Commission also received limited evidence about the relationship between the Iatan construction projects and the acquisition.

The hearings concluded on May 1, 2008. The Commission reopened the record in June to receive additional evidence and argument about a crane accident at the Iatan construction site and any effect on the proposed merger. On July 1, the three participating commissioners approved the proposed acquisition by a vote of two-to-one. The Commission's Report and Order became effective on July 14. The Utilities notified the Commission on July 18 that the merger had closed. The Commission denied all applications for rehearing in a twenty-seven page Order.

Public Counsel and the Industrial Intervenors filed petitions for review with the circuit court, and the circuit court affirmed. Pursuant to section 386.540, Public Counsel and the Industrial Intervenors now separately appeal that decision to this court. We have consolidated the appeals.

Review

On appeal from an order of the Public Service Commission, we review the findings and decision of the Commission and not the circuit court's judgment. *State ex rel. Pub. Counsel v. Mo. Pub. Serv. Comm'n*, 289 S.W.3d 240, 246 (Mo. App. 2009). Section 386.510 provides for judicial review that is two-pronged: the reviewing court first must determine whether the Commission's order is lawful and then must determine whether it is reasonable. *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 734 (Mo. banc 2003). The order is presumed valid, and the appellant has the burden of proving that it is unlawful or unreasonable. *Id*. "Lawfulness" is determined by "whether statutory authority for its issuance exists, and all legal issues are reviewed *de novo*." *Id*. "Reasonableness" depends upon whether "(i) the order is supported by substantial and competent evidence on the whole record, (ii) the decision is arbitrary, capricious or unreasonable, or (iii) the Commission abused its discretion." *Pub.*

Counsel, 289 S.W.3d at 246. In assessing reasonableness, we view the evidence and all its reasonable inferences in a light most favorable to the order. *AG Processing*, 120 S.W.3d at 735.

The utility companies in this case are regulated public utilities subject to the provisions of Chapter 393. *See id.* Section 393.190.1 requires regulated utilities to obtain approval from the Public Service Commission for transactions such as those at issue here. *Id*. That statute provides the *lawful authority* for the Commission's decision in such cases. *See id*. The *reasonableness* of the Commission's decision turns on the standard used to determine whether a merger should be approved, that is, whether the merger would be "detrimental to the public." *Id*. (*quoting State ex rel. City of St. Louis v. Pub. Serv. Comm'n of Mo*., 73 S.W.2d 393, 400 (Mo. banc 1934); 4 CSR 240-3.115 (2003)).

Point I: Commission's Refusal of Offers of Proof

The Office of Public Counsel and the Industrial Intervenors both argue that the Commission's refusal to allow an offer of proof as to the Utilities' policies on corporate conduct and gifts and gratuities was unlawful, unreasonable, and an abuse of discretion. Public Counsel says the Commission also erred in denying an offer of proof as to additional information about the Iatan construction projects.

The Industrial Intervenors and Public Counsel argue that refusal of the offers constitutes reversible error because the excluded evidence was "directly relevant" to the "detrimental to the public" standard that the Commission must apply. The Industrial Intervenors say the Commission deprived them of their constitutional right to judicial review, in that, absent the excluded evidence, a reviewing court cannot determine whether the decision is "supported by competent and substantial evidence." *See* MO. CONST. art. V, sec. 18. They also say that section

536.070(7), which permits exclusion of "wholly irrelevant" evidence in administrative proceedings, does not apply to the Commission.

The Appellants argue only that the *offers of proof* were wrongly excluded. They wish for this court to remand for the Commission to receive the excluded offers of proof and reconsider the merger.

Section 386.240 permits the Commission to delegate rulings on the admissibility of evidence to a presiding officer. *See* also 4 CSR 240-2.110, 240-2.120, and 240-2.130 (2000). The presiding officer (or "Regulatory Law Judge") is a commissioner or an employee of the Commission who is an attorney. *See* 1 Mo. Admin. Law sec. 12.17 (MoBar 3rd ed. 2000). Here, the presiding officer rejected an offer of proof on the basis that its subject matter was "wholly irrelevant" to the issues at hand. Section 536.070(7) provides the statutory basis for that ruling:

> Evidence to which an objection is sustained shall, at the request of the party seeking to introduce the same, or at the instance of the agency, nevertheless be heard and preserved in the record, together with any cross-examination with respect thereto and any rebuttal thereof, *unless it is wholly irrelevant,* repetitious, privileged, or unduly long.

(Emphasis added.) Section 536.070(8) provides that "[i]rrelevant and unduly repetitious evidence *shall* be excluded." (Emphasis added.) This court has found, pursuant to these statutory provisions, that the Commission is not required to hear evidence that is irrelevant and repetitious. *See Envtl. Utils., LLC v. Pub. Serv. Comm'n*, 219 S.W.3d. 256, 265 (Mo. App. 2007). Moreover, the Commission is authorized to limit the issues addressed at the hearing pursuant to its governing regulations. *Id*. (*citing* 4 CSR 240-2.110(4) (2000)). Commission Rule 4 CSR 240-2.130(3) (2002) permits the exclusion of "wholly irrelevant" evidence in language that is nearly identical to section 536.070(7).

Contrary to the Industrial Intervenor's claims, section 536.070 was applicable to this hearing. Chapter 536, the Missouri Administrative Procedures Act, operates to fill gaps in Chapter 386, the Public Service Commission Law. *State ex rel. A&G Commercial Trucking v. Dir. of Manufactured Housing & Modular Units Program of Pub. Serv. Comm'n*, 168 S.W.3d 680, 682-83 (Mo. App. 2005). "Thus, the procedures delineated in Chapter 536 for a hearing and for the presentation of evidence during a hearing apply unless a contrary provision exists in Chapter 386." *State ex rel. Util. Consumers Council v. Pub. Serv. Comm'n*, 562 S.W.2d 688, 693 n.11 (Mo. App. 1978). *See also* 4 CSR 240-2.130(1) (2002) (stating that the rules of evidence for Commission hearings "supplement section 536.070").

The Industrial Intervenors say that section 536.070(7) conflicts with section 386.510 and, thus, does not apply here. Section 386.510 provides that if the order is reversed because the Commission failed to receive "properly proffered" testimony, the circuit court "shall remand the cause to the commission, with instructions to receive the testimony so proffered and rejected, and enter a new order based upon the evidence theretofore taken, and such as it is directed to receive." The Industrial Intervenors argue, essentially, that this means the Commission is *required* to receive all evidence.

We disagree. Section 386.510 simply permits the reviewing court, *upon reversal*, to direct the Commission to hear "properly proffered" evidence that was excluded -- whether or not preserved by an offer of proof -- and the Commission is obligated to do so. It does not mandate *reversal* if such evidence is excluded; nor does it require the Commission to receive all evidence offered to it. The Commission was not required by section 386.510 (or any other statute) to accept a "wholly irrelevant" offer of proof. Section 536.070(7) does not, therefore, conflict with

section 386.510 (or any other provision of Chapter 386), and the Commission was free to rely upon that statute to exclude the offers.

Sections 536.070(7) and (8), as well as the applicable Commission rules, allow the Commission to refuse an offer of proof. Of course, if the Commission unreasonably and arbitrarily rejects an offer of proof of evidence that is relevant to the proceeding, then the court, on judicial review, may vacate the ruling of the Commission and remand the proceeding with instructions that the offer of proof be received and considered.

The question to be determined by the Commission was whether the proposed transactions would be "detrimental to the public." *See AG Processing*, 120 S.W.3d at 735. The Commission would have been aware (through its Staff and from the arguments presented at the hearing on the motion to limit the scope) of the nature of the evidence the Appellants wished to present in their offers of proof. The Staff had deposed witnesses and received many documents in its investigation of these matters. The presiding officer did permit some evidence about the Iatan construction projects on issues that he found to be relevant. The Commission heard two days of testimony on matters such as the creditworthiness of Great Plains and KCPL, management at the Iatan construction projects, procurement issues, and merger savings estimates. The Commission also reopened the record and took additional evidence following a construction accident at the Iatan construction site.

The Commission determined, based on its inquiry at the hearing on the motion to limit the scope, that other information relating to the Iatan projects and information about the Utilities' codes of conduct or gift and gratuities policies was not relevant to that question. The Commission based its finding of irrelevance, in part, on the fact that it is not permitted "to dictate the manner in which the company shall conduct its business," *quoting State ex rel. Kansas City*

Transit Inc. v. PSC, 406 S.W.2d 5, 11 (Mo. banc 1966); *State ex rel. PSC v. Bonacker*, 906 SW2d 896, 899 (Mo. App. 1995). *See also State ex rel. Harline v. Pub. Serv. Comm'n of Mo.*, 343 S.W.2d 177, 181-82 (Mo. App. 1960) (Commission may not prescribe a company's business practices or require a company to adopt any particular policies). The Commission's refusal to make the merger decision a referendum on the ethical practices of these entities may not mean that the Commission is indifferent to the need for these public utilities to have in place appropriate ethical restrictions. The Commission stated that it wanted to avoid sidetracking the hearing away from the issues that were, in the minds of the Commission members, relevant to the merger determination.[2]

"Missouri courts have long recognized that the Public Service Commission Law delegates a large area of discretion to the Commission and many of its decisions necessarily rest largely in the exercise of sound judgment." *Friendship Vill. of S. Cnty. v. Pub. Serv. Comm'n of Mo.*, 907 S.W.2d 339, 345 (Mo. App. 1995). Where the Commission's decision rests on the exercise of regulatory discretion, particularly on issues within its expertise, we will not substitute our judgment for the Commission's, nor will we re-weigh the evidence. *Pub. Counsel*, 289 S.W.3d at 247, 254. It was a matter for the Commission's discretion whether the proposed evidence about gift and gratuities policies and corporate codes of conduct was relevant to the "detrimental to the public" analysis.

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[2] Public Counsel also suggests that the Commission's decision to refuse the offers of proof on the gift and gratuity policies and the additional Iatan issues was based on the "mistaken notion" that the parties wanted to introduce evidence about the anonymous letters themselves, rather than to introduce evidence about the *issues* mentioned in the letters. We do not read the Commission's ruling as rejecting the offers of proof on the basis that they were going to be based solely on the anonymous letters. It is clear from the transcript of the hearing that the Commission was aware that the testimony of Utility employees and executives would be offered on this issue.

As a reviewing court, we do not *automatically* reverse the ruling of an administrative agency or tribunal merely because an offer of proof was rejected. In fact, we cannot know that the proffered evidence was relevant unless the appellant is able to demonstrate the relevance. If the Commission rejects an offer of proof, the Commission risks the possibility that, on judicial review, this court will determine that the evidence was not "wholly irrelevant." But it is up to the proponents of the evidence to demonstrate that the evidence would in fact have been directly pertinent to the matter at issue. This court cannot *assume* that the gift and gratuity policies of KCPL and Great Plains are or would be so detrimental to the public interest that the merger should not be allowed. The Appellants completely fail to make the necessary showing.

The Industrial Intervenors say in their opening brief simply that "the Commission should be required to consider [KCPL's] gift and gratuity policy, because that policy or the expansion of that policy will have a direct impact on the utility's costs and therefore its future rate increases." The closest they come to providing specifics is in their reply brief, which states:

> That evidence, if presented, could have shown not only the loose nature of KCPL's policy, but also its lackadaisical approach to policing even that loose policy. Questions properly arose as to whether KCPL was operating in a least cost manner, or whether KCPL was engaged in purchasing practices which served to protect benefits that procurement personnel might have received for swinging business in a particular direction. Questions were properly raised as to whether this liberal and loose KCPL policy would become the standard mode of operation for the new company, or whether the stricter Aquila standard would be retained.

This statement is supported by no citation to the record -- not even to written or oral argument to the Commission at or prior to the time it rejected any offers of proof. The Office of Public Counsel's most specific discussion also does not appear until its reply brief, where it says (also without citation):

> The evidence regarding purchasing practices and codes of conduct would have tended to show that KCPL/[Great Plains'] purchasing practices and codes of

> conduct were inferior to Aquila's and that KCPL/[Great Plains'] would supplant Aquila's after the acquisition.

In a footnote, Public Counsel also suggests that this court can presume that the evidence would have been detrimental to the merger, because it was being proffered by merger opponents.

This court knows of no reason that Appellant's arguments could not have been supported by *something* in the record, such as the arguments of counsel on which the Commission acted in rejecting offers of proof. The Commission's rejection of *testimonial* offers of proof presumably did not prevent Appellants from submitting information as to anticipated testimony in some sort of "bite-sized form" so as to specifically inform the hearing officer what the testimony would show and why it was not wholly irrelevant. This should not have been difficult since each of the proposed witnesses previously had been deposed. We also note that the Commission *did* permit testimony concerning KCPL's procurement policies. In these circumstances we know of no basis to find that the Commission acted unreasonably, short of adopting a *per se* rule barring any denial of offers of proof (despite the explicit authorization for that action under section 536.070(7) and 4 CSR 240-2.130(3)). The Appellants must somehow show that the Commission acted arbitrarily and unreasonably in refusing to consider relevant and material evidence. This court will not reverse a determination of the Commission merely on the *assumption* that the evidence excluded would have been relevant and adverse to allowing the merger. The point is denied.

Point II: Majority of a Quorum

The Appellants next argue that the Commission's order is unlawful and must be reversed because it was not passed by a majority of the commissioners as required by section 386.130.

Section 386.130 states that "[a] majority of the commissioners shall constitute a quorum for the transaction of any business, for the performance of any duty, or for the exercise of any power of the commission[.]" The Appellants say that even though three of five commissioners constitute a quorum to conduct business, nothing indicates that a majority vote of that quorum is sufficient to approve a merger. They cite the following passage in support:

> [Section 386.130 provides that] "while individual commissioners may hold 'investigations, inquiries and hearings' ..., the final act must be that of the commission as a body at a meeting attended by a quorum.... *In order that there should have been a valid order, it was necessary that it should appear that it had been adopted by the commission, acting at least by a majority,* and at a stated meeting, or a meeting properly called and of which all the commissioners had been notified and had an opportunity to be present."

Philipp Transit Lines, Inc. v. Pub. Serv. Comm'n, 552 S.W.2d 696, 700-01 (Mo. banc 1977) (emphasis added). The Appellants say this passage means that the body must act by a concurrence of at least a majority of the commissioners, and not a majority of the quorum. In other words, there must be *both* a majority of members in concurrence *and* a quorum present at the vote.

We disagree. We note, first, that *Philipp Transit* did not address the question of whether a majority of the quorum could act for the Commission and, thus, is inapposite. The question there was whether the Commission could approve a final order by a system of "notational voting"[3] without the commissioners ever meeting together as a body. *Id.* at 698. The Court found that the system did not comport with section 386.130, which requires collegial action at a meeting at which a quorum of the Commission is present. *Id.* at 703.

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[3] "Notational voting" meant that each individual commissioner received a copy of the proposed order along with a notational voting sheet; each would then indicate his concurrence or dissent on the sheet without ever meeting as a body. *Philipp Transit*, 552 S.W.2d at 697 n.1.

Furthermore, longstanding authority in both Missouri and the federal courts holds that in the absence of a contrary statutory provision, a majority of a quorum -- that is, a simple majority of a quorum -- of an administrative agency is authorized to act for the body. *See, e.g., Fed. Trade Comm'n v. Flotill Prods., Inc.*, 389 U.S. 179, 183-84 (1967) (stating that "[t]he almost universally accepted common law rule is [that] in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body"; "[w]here the enabling statute is silent on the question, the body is justified in adhering to that common-law rule"); *State ex rel. Kiel v. Riechmann*, 142 S.W. 304, 311-12 (Mo. 1911) (holding that only a quorum can sit as the committee, but that, in the absence of a controlling statute to the contrary, a majority of a quorum is sufficient for a statutory body to conduct business and "such measure is valid and binding as if adopted by the entire vote of the committee"); *Hardesty v. City of Buffalo*, 155 S.W.3d 69, 74 (Mo. App. 2004) (holding that absent a constitutional or statutory provision to the contrary, the common law rules regarding quorums applied, and where four members constituted a quorum, "an affirmative vote from three of [them] would be sufficient to transact the City's general business"). *See also* 2 AM.JUR.2D *Admin. Law* sec. 82 (2004) ("A quorum generally consists of a simple majority of a collective body; in the absence of a statutory provision contrary to the common law, a majority of such a quorum is empowered to act for the body.").

The Commission is statutorily authorized to conduct business as a quorum under section 386.130. The Utilities point out that there have been no changes to section 386.130 since it was originally enacted in 1913 (despite several re-codifications), and that the legislature has never expressed its intent to require the Commission to act by anything other than a majority of a quorum. The Appellants point to no applicable statutory provision that is in abrogation of the

common law rule that "a majority of a quorum ... of a collective body is empowered to act for the body." *See Flotill*, 389 U.S. at 183. Consequently, in accordance with the foregoing authorities, we conclude that the common law rule applies.

Here, a statutory quorum of three commissioners heard the case, and a majority of that quorum voted to approve. Under the common law rule, the majority of the quorum was empowered to act for the body. Because the Commission's approval of the merger by a 2-to-1 vote reflected a majority of a quorum, the decision was lawful. It also was reasonable for the three remaining commissioners (a quorum) to hear the case and issue a decision after two of the commissioners removed themselves from the case. Point denied.

Issue III: Appearance of Impropriety

The Office of Public Counsel argues that the Commission committed reversible error in denying its motion to dismiss. Public Counsel says that because the pre-filing meetings between the commissioners and the Utilities' executives "created a strong appearance of impropriety," those commissioners should have recused themselves. Had they done so, the sole remaining commissioner could not legally have acted on the application (since one commissioner cannot constitute a quorum), thereby making it subject to dismissal.

On four or five occasions in January 2007, two Great Plains executives met privately with members of the Commission to discuss the proposed acquisition of Aquila. Two of the three commissioners who ultimately heard the case participated in those meetings. No notice was given to the public or to the Public Counsel about the meetings. The executives later testified that the purpose of the meetings was to provide notice of the proposal for the merger to the commissioners prior to making a public announcement. They stated that the conversations were informational, educational, and designed to avoid surprise. Although the elements of the

proposed merger were communicated, the executives said the commissioners made no commitments to them. The Utilities publicly announced the proposed merger shortly thereafter on February 7, 2007. They applied for approval from the Commission in April 2007.

Public Counsel suggests that the commissioners should be subject to the same rules of conduct that apply to the judiciary. Public Counsel cites judicial canons which would prevent a judge from having *ex parte* communications about either a pending or an "impending" proceeding, independently investigating facts in a case, or acting in a manner that would create the appearance of impropriety.[4] Public Counsel says that a reasonable person would have believed that the private meetings held in early January gave the appearance of impropriety.

The Commission is specifically authorized to function in a quasi-legislative as well as a quasi-judicial capacity. *See* section 386.210.1, RSMo Cum. Supp. 2009; s*ee also, e.g., State ex rel. Gulf Transp. Co. v. Pub. Serv. Comm'n*, 658 S.W.2d 448, 465 (Mo. App. 1983) (Shangler, J., dissenting). Thus, the Commissioners are not always functioning in a way that is adjudicative. The statutory scheme permits communications between commissioners and members of the public regarding industry matters that are not the subject of a *pending* proceeding. Section 386.210.1 permits commissioners to "confer ... with the members of the public, any public utility or similar commission of this and other states and the United States of America, or any official, agency or instrumentality thereof, on any matter relating to the performance of its duties."

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[4] *See* Missouri Supreme Court Rule 2.03, Canons 2A, 3B(7), 3E(1), and 4. The Commission did not make an express finding as to whether the judicial canons apply to commissioners but found the Utilities' arguments that they do not apply persuasive. Although we need not definitively resolve the issue, we know of no authority to the effect that either the legislature or the courts have made such canons specifically applicable in every respect, particularly when the Commissioners are acting in a non-adjudicative capacity. (We also note that Canon 3B(7)(e) specifically exempts from the bar on *ex parte* communications those communications "expressly authorized by law.") Of course, it is clear that the fundamentals of due process must be observed. *See State ex rel. AG Processing, Inc. v. Thompson*, 100 S.W.3d 915, 919-20 (Mo. App. 2003).

Pursuant to section 386.210.2, "[s]uch communications may address any issue that at the time ... is not the subject of a case that has been filed."

In denying the motion to dismiss, the Commission found, as a matter of law, that there was no improper *ex parte* communication, because there was no pending proceeding at the time. *See* 4 CSR 240-4.020(7) (1976) (prohibitions on *ex parte* communications apply "from the time an on-the-record proceeding is set for hearing ... until the proceeding is terminated by final order").

When the commissioners function in an adjudicative mode, they are required to observe principles of conduct that ensure fundamental due process for the parties to the proceeding. *State ex rel. AG Processing, Inc. v. Thompson*, 100 S.W.3d 915, 919-20 (Mo. App. 2003). Commissioners acting "in an adjudicative capacity" must follow procedural due process requirements to ensure a fair hearing and, like judicial officers, "must be free of any interest in the matter to be considered by them." *Id*. We certainly expect Commissioners to be conscientious, principled, and ethical in everything they do, but the due process concern relates to the adjudicative role. An officer should recuse when a reasonable observer would have "*a factual basis* to find an appearance of impropriety and thereby doubt the impartiality" of the officer. *See Moore v. Moore*, 134 S.W.3d 110, 115 (Mo. App. 2004) (emphasis added).

The Commission found that Public Counsel "offer[ed] no legitimate factual basis from evidence in the record to support a conclusion of actual bias or prejudgment on the part of the Commissioners." The Commission concluded that "no reasonable person with total knowledge of the content of these conversations, the context surrounding the legislatively sanctioned conversations, and the timing of the conversations could conclude that the Commissioners were biased or that there was even a remote appearance of impropriety." The Commission's factual

findings are presumptively correct, and if substantial evidence supports either of two conflicting factual conclusions, this court ordinarily is bound by the Commission's findings. *AG Processing*, 120 S.W.3d at 735. Assessment of witness credibility is for the Commission, "which is free to believe none, part, or all of the testimony." *Pub. Counsel*, 289 S.W.3d at 247.

It should be noted, however, that the Commission's responses did not totally blunt the embarrassment created by the Commission's meetings with the Utilities, at which the participants (in the absence of any representative of the public interest) discussed the possibility or the proposal of a merger. Because we are here talking about the *appearance* of impropriety, not the *fact* of impropriety, it is somewhat lame to assert, after the fact, that any neutral, reasonable observer who was present at the session and "knew all about what occurred" would think everything was proper. That may be entirely true, but it misses the mark of the criticism, which is that the meetings took place at all in an *ex parte* environment. The Public Counsel's objection is that no one representing the public *actually was allowed to be present to observe* the sessions firsthand themselves.

We note that *subsequent to* the proceedings in this case, the applicable regulation related to *ex parte* communication was changed significantly to more strictly regulate communications with the commissioners. *See* 4 CSR 240-4.020(7), as amended in 2009, effective July 30, 2010. Under that new version, the meetings in question here may have violated the Commission's own regulations. The new regulation, however, was not applicable at the time of these proceedings, and it cannot be demonstrated that the *ex parte* discussion impacted the result of this proceeding in any way.

While the foregoing accusations and the *ex parte* meetings might create some disquietude in this court about whether the public interest is in fact served by the merger, we function only as

a court of law reviewing the legality under the statutory scheme of an administrative proceeding on the record. We are not a court of political or public opinion. The proceeding was conducted in accordance with statute and regulation and, thus, is presumed to have been appropriately and lawfully conducted until the contrary has been demonstrated. "[A] party challenging the [impartiality] of the decision-maker has the burden to overcome that presumption." *Thompson*, 100 S.W.3d at 920. We would be very reluctant, in the absence of the violation of a specific statute or rule, to set aside an administrative determination allowing a merger where there is no clear evidence that the *ex parte* communications actually influenced the result of the proceedings. Although testimony was received regarding the content of the discussions during the *ex parte* meetings, and Public Counsel does not argue that it was prevented from exploring evidence on this issue to the full extent it deemed appropriate, no factual basis to question the Commissioners' faithful discharge of their duties has been identified here.

We cannot say that the Commission erred in denying the motion to dismiss. Point denied.

Conclusion

The judgment is affirmed.

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James M. Smart, Jr., Judge

All concur.